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In The

Supreme Court of the United States

..... Term, 1955

No. .....

State of North Carolina,
The North Carolina Department of Agriculture,
The North Carolina State Highway and Public Works Commission,
The North Carolina Farm Bureau Federation, Inc., and the Farmers Cooperative Exchange,
Plaintiffs,

v.

United States of America,
The Interstate Commerce Commission,
Aberdeen and Rockfish Railroad Co., et al.,
Defendants.

JURISDICTIONAL STATEMENT

This is an appeal by the State of North Carolina and others from the final judgment of a special District Court of three judges for the Eastern District of North Carolina, convened in accordance with the provisions of 28 U.S.C. 2325, and 2284. The judgment of the District Court, dated February 11, 1955, denying the relief prayed for by the plaintiffs and dismissing the action has not been published in the official or unofficial reports. A copy of the opinion and judgment of the District Court is appended hereto.

THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

(1) This is a proceeding by the State of North Carolina and others to set aside and enjoin the enforcement of, and compliance with, an order of the Interstate Commerce Commission authorizing and directing the defendant railroads to increase their rates and charges for the transportation of freight in intrastate commerce within the State of North Carolina, and to enjoin the defendant railroads from charging for such transportation rates in excess of those established for such service by the State of North Carolina. The proceeding was instituted in the District Court for the Eastern District of North Carolina pursuant to the provisions of 28 U.S.C. 1336, 2284, and 2321 through 2325.

(2) The judgment, the review of which is sought by this appeal, was entered by the District Court of three judges for the Eastern District of North Carolina on February 11, 1955, and notice of appeal was filed in the said District Court on March 11, 1955.

(3) Jurisdiction of this appeal is conferred upon this Court by the provisions of 28 U.S.C. 1253, 62 Stat. 926.

(4) The jurisdiction of the Court over this appeal is sustained by numerous cases, including the following:

King v. United States, 344 U. S. 254, 73 S. Ct. 259, 97 L. Ed. 301 (1952);

North Carolina v. United States, 325 U. S. 507, 65 S. Ct. 1260, 89 L. Ed. 1760 (1945);

United States v. Hancock Truck Lines, 324 U. S. 774, 65 S. Ct. 1003, 89 L. Ed. 1357 (1945);

Interstate Commerce Commission v. Hoboken Manufacturers Railroad Co., 320 U. S. 368, 64 S. Ct. 159, 88 L. Ed. 107 (1944), Rehear. den., 321 U. S. 801, 64 S. Ct. 516, 88 L. Ed. 1088 (1944).

QUESTIONS PRESENTED BY THIS APPEAL

1. Under what circumstances may the Interstate Commerce Commission fix rates to be charged by railroads for the transportation of freight in intrastate commerce?

2. Is there substantial evidence in the record, considered

as a whole, to support the finding by the Interstate Commerce Commission that the rates established by the State of North Carolina for the transportation of freight in intrastate commerce cause undue, unreasonable, or unjust discrimination against interstate or foreign commerce?

3. Is there substantial evidence in the record, considered as a whole, to support the finding by the Interstate Commerce Commission that the rates established by the State of North Carolina for the transportation of freight in intrastate commerce cause any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand?

4. May the Interstate Commerce Commission increase intrastate rates when no increase has been sought from the State, or in excess of the increase sought from the State?

STATEMENT OF THE CASE

(a) *Origin and History of the Case*

This case arises out of an investigation by the Interstate Commerce Commission under Section 13 (4) of the Interstate Commerce Act, pursuant to a petition by the defendant railroads requesting authority to charge for the transportation of freight in intrastate commerce within the State of North Carolina rates in excess of those established and fixed by the State.

The case has its origin in the proceeding before the Interstate Commerce Commission known as Ex Parte No. 175. In that proceeding a series of orders was issued authorizing increases by all the railroads throughout the United States in interstate freight rates only. In effect, this series of orders authorized first a 6% increase, and then an additional 9% increase in interstate rates. That proceeding did not deal with intrastate rates.

Following the 6% increase in interstate rates, the railroads, who are defendants here, applied to the North Carolina Utilities Commission for a like increase in intrastate rates to expire February 28, 1953, which was the expiration

date fixed by the Interstate Commerce Commission's orde for the interstate increase. The North Carolina Utilities Com mission granted this increase subject to certain exception dealing with specified commodities. No appeal from that orde was taken.

Before the expiration of the 6% interstate increase, th Interstate Commerce Commission issued its order extendin the 6% increase and granting a further increase of 9%, bot to expire February 28, 1954. Again, the railroads, who ar defendants here, sought authority from the North Carolin Utilities Commission to increase their intrastate rates i North Carolina by the additional 9% and to extend the 6% increase, both to expire February 28, 1954. The plaintiffs i this case appeared in opposition. On July 9, 1953, the Nort Carolina Commission issued its order granting the full 15% increase in intrastate rates except that no increase was au thorized in the rate on fertilizer and fertilizer materials, th increase on road aggregates was limited to 6%, and the in crease on asphalt was limited to 9% of the rates previousl in effect. All increases were to expire February 28, 1954.

From this order by the North Carolina Utilities Commissio the State appealed to the Superior Court of Wake County North Carolina. That court reversed the order of the Nort Carolina Commission for the reasons, in substance, that i was arbitrary, in excess of the Commission's statutory au thority, and unsupported by substantial evidence in view o the entire record. From that judgment the railroads appeale to the Supreme Court of North Carolina, where the appea was heard on November 2, 1954. The decision of the Suprem Court of North Carolina has not yet been announced.

While the above-mentioned appeal was pending in th Superior Court of Wake County, the Interstate Commerc Commission extended the interstate increases to Decembe 31, 1955, and the railroads then filed yet another petition wit the North Carolina Commission seeking an extension t December 31, 1955, of the intrastate order which was then o appeal to the state court. In this petition the railroads di not ask that any change be made with reference to the intra state rates then in effect. That is, the railroads then aske the North Carolina Commission to fix intrastate rates so a

to extend the 15% increase generally but exempt fertilizer and fertilizer materials from any increase, limit the increase on road aggregates to 6% and limit the increase on asphalt to 9% of the original rates. The present plaintiffs again appeared in opposition. Before this petition could be heard the above-mentioned judgment of the Superior Court of Wake County, North Carolina, was rendered. The North Carolina Commission again heard the matter at length and, in accordance with that judgment, denied any increase in the rates.

The railroads elected not to appeal to the courts of North Carolina from this order of the North Carolina Commission, and filed with the Interstate Commerce Commission on March 11, 1954, their petition requesting it to permit them to disregard the rates so fixed by the State and put into effect on intrastate freight in North Carolina the full 15% increase on all commodities, including fertilizer, road aggregates and asphalt. The present plaintiffs intervened in opposition. Following a hearing the Interstate Commerce Commission issued its order directing the defendant railroads to put into effect on or before January 28, 1955, the full 15% increase on all intrastate transportation of freight in North Carolina, except that on certain types of cinders the increase was limited to 12%. It is this order which the plaintiffs in this action seek to have set aside and enjoined.

(b) *Findings of the Interstate Commerce Commission*

The order of the Interstate Commerce Commission is based upon the following findings and conclusions:

"1. The conditions incident to the intrastate transportation of freight in North Carolina are not more favorable than those incident to the interstate transportation in North Carolina and in the adjoining States.

"2. The amounts and percentages by which interstate freight rates and charges between points in North Carolina and points in other states were increased, as authorized in Ex Parte No. 175, are just and reasonable.

"3. The present North Carolina intrastate rates and charges on freight traffic imposed by authority of the State are abnormally low, and traffic thereunder fails to produce its fair share of the earnings required to yield revenue sufficient to

enable the respondents, under honest, economical, and efficient management, to provide adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service, and thereby accomplish the purpose of the Interstate Commerce Act, as set forth in the national transportation policy declared by the Congress, to develop and preserve a national transportation system adequate to meet the needs of the commerce of the United States, of the postal service, and of the national defense; the burden thus cast upon interstate commerce is undue in and to the extent that these intrastate rates and charges are less than they would be on the basis herein prescribed; and these intrastate rates and charges cause, and for the future will cause, undue, unreasonable, and unjust discrimination against interstate commerce.

"4. Except as to road aggregates, there is active competition between persons and localities engaged in interstate commerce moving to and from points in North Carolina, on the one hand, and persons and localities engaged in intrastate commerce in North Carolina, on the other hand; this competition extends throughout the State of North Carolina and to freight traffic generally; and the existing disparities between the current interstate and intrastate freight rates result in undue preference of and advantage to persons and localities in North Carolina in intrastate commerce and undue prejudice of and disadvantage to persons and localities in interstate or foreign commerce.

"5. The undue, unreasonable, and unjust discrimination, and the undue and unreasonable advantage, preference, and prejudice herein found to exist should be removed by applying to the North Carolina intrastate rates and charges the same respective increases as are, and for the future may be, maintained by the respondents on like interstate traffic between points in North Carolina and adjoining States under our authorization in Ex Parte No. 175, except that an increase of not exceeding 12 per cent may be applied to the North Carolina intrastate rates on cinders, coal; cinders, clay or shale (Haydite); cinders, slate; coal ashes and slag, expanded, in open-top cars.

"6. The establishment of increases in intrastate rates and

charges as prescribed in finding 5 will not result in unreasonably high rates or charges, nor in rates or charges that are unreasonable in relation to interstate rates or charges, and will increase the respondents' revenues by at least $1,300,000 annually.

"7. The increased revenues to the respondents which will result from the increased rates and charges as provided in finding 5 are required from intrastate traffic in North Carolina in order to enable the respondents to provide adequate and efficient railway transportation service."

(c) *Wherein the Record Fails to Support the Order of the Interstate Commerce Commission*

The appellants submit that there is no substantial evidence in the record, considered as a whole, to support findings 3, 4 (except as to the existence of competition), 5, 6, or 7. This being true, the order of the Interstate Commerce Commission is beyond its authority under Section 13 of the Interstate Commerce Act for there is no substantial evidence in the record, considered as a whole, to show that the rates fixed by the State of North Carolina cause any undue or unreasonable advantage, preference, or prejudice as between persons and localities in intrastate commerce on the one hand and persons and localities in interstate commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce.

The record contains no substantial evidence to show: (1) that the railroads operating in North Carolina, or any of them, are not now rendering adequate and efficient service; (2) that they need additional revenues to enable them to continue to render such service; (3) that the intrastate business of these railroads within North Carolina does not, under the rates prescribed by the State, produce its fair share of the revenues required for this purpose; or (4) that an increase in such rates will result in either (a) improved service, (b) lower interstate rates, or (c) any increase in the flow of interstate commerce.

There is no evidence whatever in this record to show what return these railroads, or any of them, now earn from intrastate freight service, or intrastate freight and passenger serv-

ice combined, upon the properties attributable to such services. There is no evidence in the record to show what the value of those properties is. There is no evidence in the record to show the total cost of carrying intrastate freight in North Carolina. There is no evidence in the record to show what profit the railroads, or any of them, are now making from intrastate freight service in North Carolina, and in the absence of such evidence there can be in this record no support for the Commission's finding that the North Carolina intrastate freight rates do not now produce their fair share of the revenue needs of the defendant railroads.

The only evidence in the record as to the cost of service was expressly limited by the railroads' witnesses to the wages for the train crew and the cost of fuel, materials, and supplies consumed in the actual running of the train. Each witness specificially disclaimed any knowledge of, or intent to testify about, any other costs of transportation or about the proper allocation of joint costs between interstate and intrastate traffic. In the absence of evidence as to joint costs there cannot possibly be a finding, supported by evidence, that the North Carolina intrastate traffic was not contributing its fair share of the revenue requirements of the railroads under the rates fixed by the State.

There is in the record evidence introduced by the railroads themselves, showing that North Carolina is more heavily industrialized than any of the other states they serve, that it is becoming increasingly industrialized, that the value of its agricultural products is far in excess of those of any other state served by them, and that this necessarily means more intrastate freight to be moved by these railroads in North Carolina than in any other state served by them. The greater volume of intrastate traffic over these railroads in North Carolina, as compared with other parts of their systems, leads inescapably to the conclusion that the cost per ton-mile of intrastate freight in North Carolina is lower than the cost per ton-mile on other portions of these railroads' systems.

There is nothing whatever in the record to show that the full cost of transporting freight in intrastate commerce in North Carolina is the same as the full cost of transporting freight on any of these railroads considered as a whole. On

the contrary, the Chief Accountant of the Southern Railway, concluded his entire testimony with this statement:

> "I think it would be foolish for me or any accountant to assume that it costs the same to move a ton of freight, interstate or intrastate, in North Carolina, as it does on the entire system."

The witnesses for the railroads testified that they did not know the investment properly attributable to intrastate freight service in North Carolina, or to intrastate freight and passenger service combined in North Carolina. The only witness purporting to have knowledge of the financial needs of and the returns earned by all of these railroads testified that he did not know the rate of return for each, all, or any group of these railroads from intrastate freight service in North Carolina or from North Carolina intrastate freight and passenger service combined. The Traffic Manager for the Seaboard Railroad testified that he could not tell whether the Seaboard's intrastate freight traffic in North Carolina is more or less profitable than its interstate traffic in North Carolina in proportion to the investment attributable to its service, or equally so. The Traffic Manager for the Atlantic Coast Line testified that he has no idea what the net revenues produced by the present North Carolina intrastate rate schedule are, and no idea what the rate of return earned by the Atlantic Coast Line from intrastate business in North Carolina is. He added, "Nor has anyone else."

Nowhere in the entire record is there the slightest suggestion that the service of any of these railroads is not adequate or efficient.

The record shows that these railroads as a group are now earning a fair return from their entire business on their entire investments, and that they do not require additional revenues, either to maintain adequate service or to attract necessary capital, either debt or equity capital. There is no suggestion in the record, or in the order of the Interstate Commerce Commission, that the increase in intrastate rates will or could lead to a reduction in interstate rates and thus to a lightening of the financial burden now resting on interstate shippers.

The Interstate Commerce Commission found that 87% of the total revenue from intrastate freight in North Carolina is received by four of these railroads: the Atlantic Coast Line, the Norfolk-Southern, the Seaboard, and the Southern. Notwithstanding increased wages, cost of materials and taxes since 1945, on which the petitioners rest their case, the record contains undisputed testimony and data showing for these four railroads the following results from 1945 to 1953:

Atlantic Coast Line. Its operating ratio has dropped nearly 3 points notwithstanding the fact that no other railroad of comparable size in the entire country had so large a maintenance ratio. Its net railway operating income has almost doubled. Its net income has more than doubled. Its earnings per share of common stock have more than doubled. Its dividend per share has been increased from $3.75 to $6. Its earned surplus is approximately $55,000,000 more than it was in 1945, and is more than double its capital stock.

Norfolk-Southern Railway. Its operating ratio has dropped over 4 points. Its net railway operating income has nearly doubled. Its net income is approximately 7 times as large. Its earnings per share have doubled. Its dividend per share has risen from $1 to $3.40. Its long term debt has been cut in half. Its capital stock outstanding has been increased by 56%. Its surplus has more than doubled.

Seaboard Air Line Railroad. Its operating ratio has dropped over 13 points. Its net railway operating income has more than doubled. Its net income has risen from a deficit of over $10,000,000 to a positive figure of nearly $21,000,000. Its earnings per share have gone from a deficit to $22.25 per share. Its dividends have gone from zero to $7.50 per share. It has retired or converted into common $15,000,000 of preferred stock. Its earned surplus has gone from a deficit of approximately $85,000,000 to a surplus of over $77,000,000.

Southern Railway. Its operating ratio was exceptionally good in 1945, but is more than 2 points better now. Its net railway operating income is up by approximately 60%. Its net income has more than doubled. Its earnings per share of common stock have more than doubled. Its dividend has been increased from $3 to $5 per share and it has split its

common stock, 2 for 1. Its earned surplus has been increased by approximately $92,000,000 and is substantially more than its capital stock.

When a railroad corporation, or a group of railroad corporations, under existing rates, enjoys the greatest prosperity in its history, pays all operating expenses, all taxes, all maintenance, all depreciation, all interest, redeems preferred stock, pays dividends on common stock from $5 to $6 per share, and adds each year to its earned surplus many millions of dollars, that railroad, or group of railroads, is not being deprived of a fair return on its investment by the existing rate schedule. *Lindheimer v. Illinois Bell Telephone Co.*, 292 U.S. 151, 54 S. Ct. 658, 78 L. Ed. 1182 (1934).

There is no substantial evidence in the record to support the Commission's finding that the intrastate rates fixed by the State result in undue preference of and advantage to persons and localities in intrastate commerce and undue prejudice of and disadvantage to persons and localities in interstate or foreign commerce.

The witnesses for the railroads made it clear that they did not contend that the intrastate rates established by North Carolina were a barrier to the free flow of interstate commerce into or out of the State. Their sole contention was that a disparity existed between intrastate and interstate rates where the distances travelled were the same. This is not enough to sustain the order of the Interstate Commerce Commission. *Florida v. United States*, 282 U.S. 194, 51 S. Ct. 119, 75 L. Ed. 291 (1931).

Section 13 of the Interstate Commerce Act does not require uniformity between interstate and intrastate rates. The Act does not contemplate that the state commissions will be mere clerical bodies, automatically putting into effect in intrastate commerce such increases or decreases in rates as the Interstate Commerce Commission may find proper in interstate commerce. It is only when the intrastate rate causes an "undue or unreasonable advantage, preference, or prejudice" between persons or localities in intrastate commerce on the one hand, and those in interstate or foreign commerce on the other hand, that the Interstate Commerce Commission is authorized to act. The mere fact that the

interstate and intrastate traffic move on the same train, and give rise to the same operating expenses, is not sufficient to show such undue or unreasonable advantage, preference, or prejudice. *North Carolina v. United States,* 325 U.S. 507, 65 S. Ct. 1260, 89 L. Ed. 1760 (1945).

The record contains no evidence showing that the North Carolina intrastate freight rates prevent or hinder shippers in other states from reaching the North Carolina market in competition with North Carolina producers of like commodities. On the contrary, the testimony and exhibits of the traffic experts of the several railroads show conclusively that shipments from other states do reach the North Carolina market in tremendous volume. The Freight Traffic Managers of the Southern and the Seaboard testified that there is a great volume of goods flowing into North Carolina from other states in competition with North Carolina products, and that the railroads do not take the position that the North Carolina intrastate rates prevent such interstate movement, or make it impossible for the out-of-state producer to compete for the North Carolina market.

Exhibits introduced in evidence by the railroads show that in a test period selected by them nine times as many less-than-carload shipments reached North Carolina markets from out of the State as reached those markets from other North Carolina points. Other exhibits prepared and introduced by the railroads show all carload shipments of each commodity to North Carolina points from North Carolina shippers, and shipments of the same commodity from shippers outside the State during the same test period. Typical comparisons are as follows:

Asphalt—32 carloads from other states, 5 from North Carolina;

Brick—20 carloads from other states, 14 from North Carolina;

Paper bags—19 carloads from other states, 5 from North Carolina;

Furniture—62 carloads from other states, 6 from North Carolina;

Cigarette paper—10 carloads from other states, 7 from North Carolina;

Molasses—8 carloads from other states, 2 from North Carolina;

Poles—42 carloads from other states, 8 from North Carolina;

Canned goods—239 carloads from other states, 20 from North Carolina;

Cotton—550 carloads from other states, 103 from North Carolina;

Feed—480 carloads from other states, 259 from North Carolina;

Fertilizer—2,103 carloads from other states, 1,285 from North Carolina;

Lumber—481 carloads from other states, 101 from North Carolina.

These exhibits show conclusively that the out-of-state producer was quite successful in his efforts to compete for the North Carolina market while the rates fixed by the State were in effect. Thus, the evidence introduced by the railroads shows that the State's rate structure does not act as a barrier to the free flow of interstate commerce into or out of North Carolina. All that the railroads have shown is that before the Commission granted the Ex Parte No. 175 increases, the rates on interstate shipments and intrastate shipments for the same distances were the same; whereas now they are not the same. This is not sufficient to show either that the North Carolina rates do not produce their fair share of the revenue requirements of these railroads, or that they create any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and those in interstate or foreign commerce on the other hand.

It is, of course, conceivable that under the State's rate structure, or any other rate structure, an adjustment should be made in the rates on a particular commodity moving between certain localities in order to enable a producer in another state to reach the North Carolina market on more favorable terms. Such a showing with reference to a single commodity, however well established, falls far short of justification for a general intrastate freight increase such as the

Interstate Commerce Commission has ordered.

There is no substantial evidence in the record to support the Commission's finding number six that the increase in intrastate rates will increase the defendant railroads' revenues by $1,300,000 annually. Due to the relatively short distances involved, intrastate freight is far more likely to be diverted to trucks, especially shipper-owned trucks, than is interstate freight. The record shows there is ample reason to believe that to increase the intrastate freight rates will add very little to the net income of the railroads, or any of them, and may actually cause a reduction in their net income.

This does not, of course alter the fact that the increase in rates ordered by the Commission will severely injure the plaintiffs. If the railroads lose only fifteen per cent of their present volume of intrastate freight to the trucks as a result of this order, which the record shows is likely, they will derive no benefit from the increase, but the remaining eighty-five per cent of the shippers who cannot switch to trucks will still be paying the higher rates. Thus, the record shows the increase ordered by the Commission will severely injure the plaintiffs and will do the defendants little, if any, good.

With reference to fertilizer, the order of the Interstate Commerce Commission undertakes to supersede rates fixed by the State of North Carolina, as to which no complaint has been made to the North Carolina Utilities Commission. The record shows that, in their most recent petition to the North Carolina Commission, the railroads asked that Commission to permit them to continue to charge the identical rates on fertilizer which they were charging at the time of the order of the Interstate Commerce Commision. The plaintiffs respectively submit that the Interstate Commerce Commission should not require or permit an increase in an interstate rate before a complaint with reference to that rate has been presented to and acted upon by the duly constituted authorities of the State.

The Interstate Commerce Commission likewise ordered a greater increase in the rates on asphalt, sand, gravel, crushed stone and other road aggregates moving in intrastate commerce than the railroads requested the North Carolina Utilities Commission to establish in their petition filed with that

Commission on January 21, 1954.

It is respectfully submitted that this Commission should not, in any event, grant a greater rate increase than that which the railroads requested the State authorities to put into effect.

THE QUESTIONS PRESENTED REQUIRE PLENARY CONSIDERATION, WITH BRIEFS ON THE MERITS AND ORAL ARGUMENT

The questions presented by this appeal require plenary consideration, with briefs on the merits and oral argument, for their resolution because:

(1) The questions presented are substantial in nature for the reason that they involve a conflict between the State of North Carolina and the Interstate Commerce Commission in the matter of fixing the rates to be charged by railroads for transporting freight in intrastate commerce within the State, and for the further reason that the additional rates which the Interstate Commerce Commision has undertaken to approve and order to be put into effect would increase the cost to the State and its people of the transportation of freight in intrastate commerce in North Carolina by at least $1,300,000 annually if the volume of such transportation by railroads remains unchanged.

(2) The Interstate Commerce Commission has, by its order, undertaken to set aside the rates fixed by the State of North Carolina for the transportation of freight by railroads in intrastate commerce within the State, and to prescribe for such service rates in excess of those permitted by the State. The appellants submit that the order is beyond the statutory authority of the Interstate Commerce Commission for the reason that the record before the Commission does not contain substantial evidence to sustain findings by the Commission that the rates so fixed by the State cause either (1) any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or (2) any undue, unreasonable, or unjust discrimination against interstate or foreign commerce. Plenary consideration of this appeal, with briefs on the merits and oral

argument, is necessary in order that the appellants may have an opportunity to show the Court wherein the record fails to support the findings and order of the Commission, and wherein the District Court erred in denying the prayer of the complaint and dismissing the action.

(3) This appeal involves the question of whether the Interstate Commerce Commission, upon a petition by railroads serving a state, may authorize those railroads to charge for intrastate transportation rates in excess of those fixed by the state when the railroads have not sought such an increase from the proper state authorities. The proper presentation of the position of the appellants on this question requires that the appellants be permitted to file briefs and present oral argument.

(4) The questions presented are substantial in nature in that they involve a conflict in decisions on the same matters between the special District Court of three judges for the Eastern District of North Carolina in this case and a special District Court for the Southern District of Mississippi in the case of *Mississippi Public Service Commission v. United States*, 124 F. Supp. 809 (S. D. Miss., Three-Judge Court, 1954).

THE OPINION OF THE DISTRICT COURT

There is appended hereto a copy of the opinion of the District Court. No other opinion, findings of fact or conclusions of law were entered by the District Court in this action.

THE JUDGMENT OF THE DISTRICT COURT

There is also appended hereto a copy of the judgment of the District Court from which this appeal is taken.

Respectfully submitted this the 29th day of April, 1955.

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OPINION OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA

Civil Action No. 836

State of North Carolina, The North Carolina Department of Agriculture, The North Carolina State Highway and Public Works Commission, The North Carolina Farm Bureau Federation, Inc., and The Farmers Cooperative Exchange, Plaintiffs,

versus

United States of America, The Interstate Commerce Commission, Aberdeen & Rockfish Railroad Company, et al., Defendants.

On Application for Injunction.

Argued January 21, 1955. Decided February 11, 1955.

Before Parker, Circuit Judge, and Gilliam and Warlick, District Judges.

Harry McMullan, Attorney General of North Carolina, I. Beverly Lake and John Hill Paylor, Assistant Attorneys General, for State of North Carolina and North Carolina Department of Agriculture; R. Brookes Peters, Kenneth Wooten, J. Melville Broughton, Jr., and Robert B. Broughton, for North Carolina State Highway and Public Works Commission. Stanley N. Barnes, Assistant Attorney General, James E. Kilday and Willard R. Memler, Special Assistants to the Attorney General, and John T. Gaskill, United States Attorney, for the United States; Edward M. Reidy, General Counsel, and Leo H. Pou, Assistant General Counsel, for Interstate Commerce Commission.

Parker, Circuit Judge:

This is an action to set aside and enjoin the enforcement of an order of the Interstate Commerce Commission entered under Section 13(4) of the Interstate Commerce Act, 49 USC 13(4),* granting an increase of intrastate freight rates on

*Section 13(3) of the Interstate Commerce Act, 49 USC 13(3), authorizes the Commission to conduct an investigation where state rates are brought in question before it upon petition of a carrier. Section 13(4), 49 USC 13(4), is as follows:

"Sec. 13, par. (4) *Duty of commission where State regulations result in discrimination.* Whenever in any such investigation the commis-

railroads in the State of North Carolina. A court of three judges has been constituted as required by statute, the case has been heard upon the record made before the Commission and the briefs and arguments of counsel, and has been submitted for final decree. The contention of plaintiffs is that the order of the Commission, finding undue discrimination against interstate commerce and against persons and localities engaged therein, is not supported by the record.

The facts are that within the State of North Carolina, a long and narrow state, which is crossed by the great railroads constituting the principal arteries of commerce in the southeastern section of the United States, there is not now and for many years has not been any distinction between the handling of freight in interstate and intrastate commerce, the bulk of both interstate and intrastate freight being handled by the interstate railway systems in the same way and with the same instrumentalities. If there has been any difference, it is that the cost with respect to intrastate freight is greater because the hauls are shorter. For thirty years or more parity between intrastate and interstate rates has been maintained.

In Ex Parte No. 175, the Commission in 1951 and 1952 gave consideration to requested increases in freight rates throughout the United States made necessary by rising prices and higher wage rates and entered orders granting increases of interstate rates, the increases in southern territory being first 2%, then 6% and finally 15%, except as to certain commodities with respect to which smaller increases were granted. See 280 I.C.C. 179, 281 I.C.C. 557, 284 I.C.C. 589, and 289

sion, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is forbidden and declared to be unlawful it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

I.C.C. 395. Following these increases, the North Carolin Utilities Commission granted first a 6% and then an additiona 9% increase in intrastate rates on all except a very limite number of commodities. Upon appeal to the Superior Cour however, this order of the Utilities Commission was vacate and set aside, and an appeal to the State Supreme Court wa taken and is still pending.

Before the decision of the Superior Court was rendered o the appeal from the Utilities Commission, the railroads file another petition with that Commission asking that the 15% increase in rates theretofore granted, which was to expire i February 1954, be extended to December 31, 1955. The cas in the Superior Court was decided, however, before the pe tition asking the extension of the order could be heard; and on the basis of that decision, the Utilities Commission denie the requested extension.

Upon the denial of this last petition by the Utilities Com mission, the railroads sought no further relief with respec to intrastate rates from that Commission or from the Stat courts, but filed a petition with the Interstate Commerc Commission asking relief under sections 13(3) and 13(4) o the Interstate Commerce Act on the ground that the intra state rates resulted in undue discrimination against inte state commerce and persons and localities engaged therei The Commission thereupon held a hearing lasting for fou days in which it heard a great volume of testimony and gav thorough consideration to freight rates within the state an filed a report and order granting, with certain minor excep tions, the increases necessary to restore the parity betwee intrastate and interstate rates.

The report of the Commission finds in detail the evidentiar facts upon which its ultimate findings are based, and there i no contention that this finding of evidentiary facts is no amply supported by the evidence in the case. It is not neces sary to repeat them here; but it is sufficient to say that the fully support the ultimate findings of the Commission whic are as follows:

> "1. The conditions incident to the intrastate transporta tion of freight in North Carolina are not more favorabl than those incident to the interstate transportation i North Carolina and in the adjoining states.

"2. The amounts and percentages by which interstate freight rates and charges between points in North Carolina and points in other States were increased, as authorized in Ex Parte No. 175, are just and reasonable.

"3. The present North Carolina intrastate rates and charges on freight traffic imposed by authority of the State are abnormally low, and traffic thereunder fails to produce its fair share of the earnings required to yield revenue sufficient to enable the respondents, under honest, economical, and efficient management, to provide adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service, and thereby accomplish the purpose of the Interstate Commerce Act, as set forth in the national transportation policy declared by the Congress, to develop and preserve a national transportation system adequate to meet the needs of the commerce of the United States, of the postal service, and of the national defense; the burden thus cast upon interstate commerce is undue in and to the extent that these intrastate rates and charges are less than they would be in the basis herein prescribed; and these intrastate rates and charges cause, and for the future will cause, undue, unreasonable, and unjust discrimination against interstate commerce.

"4. Except as to road aggregates, there is active competition between persons and localities engaged in interstate commerce moving to and from points in North Carolina, on the one hand, and persons and localities engaged in intrastate commerce in North Carolina, on the other hand; this competition extends throughout the State of North Carolina and to freight traffic generally; and the existing disparities between the current interstate and intrastate freight rates result in undue preference of and advantage to persons and localities in North Carolina in intrastate commerce and undue prejudice of and disadvantage to persons and localities in interstate or foreign commerce.

"5. The undue, unreasonable, and unjust discrimination, and the undue, and unreasonable advantage, preference, and prejudice herein found to exist should be removed by applying to the North Carolina intrastate rates and charges the same respective increases as are, and for the future may be, maintained by the respondents on like interstate traffic between points in North Carolina and adjoining States under our authorization in Ex Parte No. 175, except that an increase of not exceeding 12 per-

cent may be applied to the North Carolina intrastate rates on cinders, coal; cinders, clay or shale (Haydite); cinders, slate; coal ashes and slag, expanded, in open-top cars.

"6. The establishment of increases in intrastate rates and charges as prescribed in finding 5 will not result in unreasonably high rates or charges, nor in rates or charges that are unreasonable in relation to interstate rates or charges, and will increase the respondents' revenues by at least $1,300,000 annually.

"7. The increased revenues to the respondents which will result from the increased rates and charges as provided in finding 5 are required from intrastate traffic in North Carolina in order to enable the respondents to provide adequate and efficient railway transportation service."

Upon these findings the Commission entered its order authorizing the railroads to put into effect a 15% increase in intrastate freight rates, except with respect to certain commodities as to which the increase was limited to 12%. The findings were in essence the same as those made by the Commission which were before the Supreme Court and were held sufficient to sustain the Commission's order in King v. United States 344 U. S. 254. In that case the Supreme Court distinguished the case of North Carolina v. United States 325 U. S. 507, upon which plaintiffs chiefly rely, on the ground that the order there was based upon the mere disparity between intrastate and interstate passenger rates and did not contain the essential findings that were made in the King case. As similar findings were made here and as they are unquestionably supported by the evidence, there would seem to be little need of further discussion. See also Louisiana Public Service Commission v. United States 125 F. Supp. 180, aff. 348 U. S. 885, and State of Tennessee v. United States 113 F. Supp. 634, aff. 346 U. S. 891.

Plaintiffs contend that there was no sufficient showing of discrimination against interstate commerce and in favor of intrastate commerce resulting from the intrastate rates. It appears, however, that, without the Ex Parte No. 175 increases on any of their traffic in 1953, the return on net

investment in 1953 for the four principal carriers receiving 87% of the intrastate revenue would have been 0.94% for the Norfolk Southern, 4.63% for the Seaboard, 4.35% for the Southern, and a deficit of more than $4,000,000 for the Atlantic Coast Line, or a combined return for the four roads of 2.84%. This is not a case, then, as plaintiffs argue, where an unnecessary increase was granted in a prosperous territory because of a need in other sections. The need for increase existed in North Carolina as these figures show, and the Commission estimated that the total loss from the non-application of the increase in 1953 was $1,500,000. As the cost of handling intrastate freight was shown to be as great as or greater than the handling of interstate freight, the raising of interstate rates without raising intrastate rates necessarily resulted in throwing an undue share of the cost of the service upon interstate transportation. As said by Mr. Justice Stone in Illinois Commerce Commission v. United States 292 U. S. 474, 485, "The effect of maintaining a lower rate, intrastate, than the reasonable interstate rate is necessarily discriminatory wherever the two classes of traffic, inextricably intermingled, are carried on, as in the District, under substantially the same conditions."

In Wisconsin R. R. Com. v. C. B. & Q. R. R. Co. 257 U. S. 563, 586, Chief Justice Taft, speaking for the court, said:

> "If the railways are to earn a fixed net percentage of income, the lower the intrastate rates, the higher the interstate rates may have to be. The effective operation of the act will reasonably and justly require that intrastate traffic should pay *a fair proportionate share* of the cost of maintaining an adequate railway system. * * * If *that purpose* is interfered with by a disparity of intrastate rates, the Commission is authorized to end the disparity by directly removing it, because it is plainly an 'undue, unreasonable, or unjust discrimination against interstate or foreign commerce,' within the ordinary meaning of those words."

The Commission went further, however, and showed that if intrastate rates had been adjusted to include the full effect of the Ex Parte No. 175 increases, the total revenues for 1953 of the principal railroads, i.e., the N. & S., the S. A. L., the Southern and the Coast Line would have been

$509,787,029 and their North Carolina intrastate revenue $11,265,176, a ratio of 2.21%. This was contrasted with their freight revenue for the year 1947, the only post war year in which increases were granted simultaneously by the Interstate Commerce Commission and the North Carolina Commission. In that year the ratio was 2.264%. It thus appears that, even with the increases asked, the ratio of intrastate to interstate revenue would be less than in 1947.

We think it equally clear that the failure to increase intrastate rates in accordance with the increase of interstate rates resulted in undue preferences to persons and localities within the prohibition of the statute. This was pointed out by the Commission in its evidentiary fact finding, where for illustration the Commission referred to the discrimination against Richmond, Va., and in favor of Winston-Salem, N. C., on shipments to Goldsboro, N. C., or against Augusta, Ga., and in favor of Mt. Airy, N. C., on shipments to Asheville, N. C. Countless other illustrations of undue discrimination against out of state shipping points as a result of the disparity between interstate and intrastate rates will occur to anyone familiar with the movement of commerce within the state. This is dealt with at considerable length in the report of the Commission, which said at the end of a rather lengthy analysis:

> " * * * the record shows the movement of intrastate and interstate carload and less than carload shipments, made during a representative period to common North Carolina destinations, of a wide variety of commodities, including all of those moving in important volume, at both the class and the commodity rates here in issue and their counterpart in interstate commerce. When, as here, there is a substantial disparity between intrastate rates and reasonable interstate rates contemporaneously applied under substantially similar transportation conditions, coupled with a showing of competition between interstate and intrastate rates as indicated by actual shipments which moved to common destinations under the intrastate and interstate rates, there arises the unjust discrimination against interstate commerce and the undue prejudice to persons or localities in interstate commerce which the act declares to be unlawful. The single exception to the foregoing are the rates on road aggregates, as to which, for the reasons above set out, the record is

inadequate to support a finding of undue prejudice and preference as between persons or localities. However, this does not preclude a finding of unjust discrimination against interstate commerce with respect to the rates on road aggregates, for the evidence is clear that the intrastate traffic in these commodities is not bearing its just proportion of the total transportation burden."

Plaintiffs complain because the Commission made no separate valuation of the property engaged in intrastate as distinguished from interstate commerce; but we agree with the Commission that it was not practicable and that it would serve no useful purpose for this to be done. As said by the Commission in its report:

"We have found in numerous proceedings of this character that a reasonably accurate separation of values, operating revenues, and expenses as between interstate and intrastate operations appears to be impracticable. In Wyoming Intrastate Freight Rates and Charges, 287 I.C.C. 743 (February 2, 1953), we said, at page 755: 'The proportionate percentage of each individual class of traffic moving intrastate and interstate is not shown. Nevertheless, where, as is the case here, the intrastate and the interstate traffic, as a whole, moves under substantially similar conditions, and the expense of handling the two classes of traffic is inextricably woven together, any attempt to do the impracticable, namely, to show separately the costs of the intrastate and the interstate service would serve no useful purpose. See Florida v. United States, 292 U. S. 1, 9: Illinois Commerce Comm. v. United States, 292 U.S. 474; North Carolina v. United States, 325 U.S. 507; King v. United States, 344 U.S. 254'."

In Illinois Commerce Commission v. United States 292 U. S. 474, 483-4, the Supreme Court said:

"Where the conditions under which interstate and intrastate traffic move are found to be substantially the same with respect to all factors bearing on the reasonableness of the rate, and the two classes are shown to be intimately bound together, there is no occasion to deal with the reasonableness of the intrastate rates more specifically, or to separate intrastate and interstate costs and revenues."

While there is allegation in the complaint and some argu-

ment to the effect that the Commission was without jurisdiction to order increase of intrastate rates until remedies under state law had been exhausted, we do not understand that point to be seriously insisted on. Certainly it is without merit. The Commission in discharging the duties imposed upon it by Congress may not be delayed by proceedings before state courts or commissions. As said by the Supreme Court in Florida v. United States 282 U. S. 194, 210, "To hold, as some of the appellants urge, that there can be no adjustment of intrastate rates by the Interstate Commerce Commission so far as may be needed to protect interstate commerce until the State itself has first 'sat in judgment on the issue of the lawfulness of those intrastate rates' would be to impose a limitation not required by the terms of the statute and repugnant to the grant of authority." Squarely in point is the decision in State of Illinonis v. United States 101 F. Supp. 36, 47, where the special statutory court of three judges, speaking through Judge Perry, said:

> "The pendency of a suit in the local courts of the State of Illinois to set aside a report and order of the Illinois Commerce Commission which refused to permit the Illinois Central Railroad Company to make any changes or increases in its presently existing suburban fares in the Chicago area did not in any manner affect the power or jurisdiction of the Interstate Commerce Commission under section 13(3) and (4) of the Interstate Commerce Act; and it was within the power of the Interstate Commerce Commission, and it was its duty, having found upon substantial evidence the existence of an unjust discrimination against interstate commerce, caused by the suburban fares in question which had been made and imposed under authority of the State of Illinois, to prescribe the rate or fare to be charged in the future in order to remove such unjust discrimination."

For the reasons stated the petition to set aside and enjoin the enforcement of the order of the Commission will be denied and the action will be dismissed.

Petition Denied and Action Dismissed.

JUDGMENT OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA

Civil Action No. 836

State of North Carolina, The North Carolina Department of Agriculture, The North Carolina Highway and Public Works Commission, The North Carolina Farm Bureau Federation, Inc., and the Farmers Cooperative Exchange, Plaintiffs,

versus

United States of America, The Interstate Commerce Commission, Aberdeen & Rockfish Railroad Co., et al., Defendants.

This cause coming on to be heard before the undersigned constituting a special District Court of three judges, convened in accordance with statute; and being heard upon the pleadings, the record made before the Interstate Commerce Commission and the briefs and arguments of counsel; and being submitted by all parties for final decree:

The Court finds the facts to be as set forth in the Report of the Interstate Commerce Commission, and being of opinion, for the reasons set forth in the written opinion filed herewith, that the plaintiffs are not entitled to the relief prayed and that the action should be dismissed:

Now therefore, it is ordered that the prayer of the complaint be denied and that the action be dismissed, and that the costs hereof be taxed against plaintiffs.

This the 11th day of February 1955.

/s/ John J. Parker
Chief Judge, Fourth Circuit.

/s/ Don Gilliam
U. S. District Judge, Eastern District of North Carolina.

/s/ Wilson Warlick
U. S. District Judge, Western District of North Carolina.

FILED
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HAROLD B. WILLEY

IN THE

Supreme Court of the United States

October Term, 1954

No. [redacted] 55

STATE OF NORTH CAROLINA, ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, ABERDEEN & ROCKFISH RAILROAD COMPANY, ET AL., *Appellees*.

Appeal From the United States District Court for the Eastern District of North Carolina

MOTION TO AFFIRM

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

October Term, 1954

No. 757

STATE OF NORTH CAROLINA, ET AL., *Appellants,*

v.

UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, ABERDEEN & ROCKFISH RAILROAD COMPANY, ET AL., *Appellees.*

Appeal From the United States District Court for the Eastern District of North Carolina

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MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, the railroad appellees move that the judgment of the District Court be affirmed on the ground that the questions raised by appellants are so unsubstantial as not to need further argument.

This is a direct appeal from a final judgment entered on February 11, 1955, by a specially constituted three-judge District Court pursuant to Sections 1336, 2321 to 2325 of Title 28 of the United States Code, dismissing the suit of the plaintiffs and intervening plaintiffs to set aside and enjoin an order of the Interstate Commerce Commis-

sion entered in proceedings entitled "Docket No. 31479, *North Carolina Intrastate Freight Rates and Charges,*" 293 I.C.C. 541. The case below is reported in 128 Fed. Supp. 718. Appellants' jurisdictional statement was filed April 28, 1955.

The aforesaid order of the Commission required the railroads operating in the State of North Carolina to increase their intrastate freight rates, with a few exceptions, by the amounts or percentages by which they had increased their interstate rates on the same commodities pursuant to authority granted by the Commission in Ex Parte No. 175, *Increased Freight Rates, 1951,* 280 I.C.C. 179, 281 ICC. 557, 284 I.C.C. 589, 289 I.C.C. 395.

THE QUESTIONS PRESENTED

Appellants contend that this appeal presents four questions which are of sufficient importance to warrant the filing of briefs and oral argument before this Court. These questions, as propounded by appellants, are:

1. Under what circumstances may the Interstate Commerce Commission fix the rates to be charged by railroads for the transportation of intrastate freight?

2. Is there substantial evidence in the record as a whole to sustain the finding of the Interstate Commerce Commission that the North Carolina intrastate freight rates, without the Ex Parte No. 175 increases, result in unjust discrimination against interstate commerce?

3. Is there substantial evidence in the record as a whole to sustain the finding of the Interstate Commerce Commission that the aforesaid intrastate freight rates result in undue advantage, preference, or prejudice as between persons and localities in intrastate commerce, on the one hand, and interstate commerce, on the other hand?

4. May the Interstate Commerce Commission require intrastate rates to be increased if no increase is sought from State authorities, or by more than the increase sought?

We shall answer these questions in the order stated above, which is the order in which appellants have stated them. But at the very outset we desire to emphasize the fact that the questions posed by appellants are primarily questions of fact. This is apparent as to the questions numbered 2 and 3, which are the ones stressed in the jurisdictional statement. The question numbered 1 is not discussed as such in that statement, and the question numbered 4 is not only without basis in fact but, as the District Court points out, has been decided adversely to appellants by this Court and the lower federal courts (128 Fed. Supp., 724-725). It is thus clear that this appeal presents no important question of law which requires determination by this Court. The question presented is merely whether the evidentiary facts found by the Commission, which appellants admit are supported by the evidence, are sufficient to support its ultimate findings (128 Fed. Supp., 721). It is not contended that the ultimate findings, if supported by the evidentiary findings, are insufficient to support the order.

STATEMENT OF THE CASE

The case is stated in the report of the Commission and the opinion of the District Court and no detailed statement is necessary here. It is believed that the following summary may prove helpful:

1. Ex Parte No. 175 is the latest of several post-war proceedings in which the Interstate Commerce Commission found that, in order to effectuate the National Transportation Policy and the rule of rate making stated in Section 15a(2) of the Interstate Commmerce Act (49 U.S.C. preceding Section 1 and Section 15a(2)), it was necessary for the railroads of the country to increase their freight rates and charges (284 I.C.C. 589).

2. The need for increased freight rates and charges was brought about by large increases in the railroads' operating expenses, due particularly to increases in the wages

of their employees, increases in the cost of materials and supplies used by them, increased taxes, and to enable them to obtain and service the capital needed to maintain at all times a transportation system adequate for the needs of commerce, the Postal Service, and the national defense (284 I.C.C. 589, 293 I.C.C., 548, 558).

3. The increased operating expenses which made increased rates necessary affected both interstate and intrastate transportation. The Interstate Commerce Commission, therefore, requested a committee of state commissioners to sit with it during the hearings in Ex Parte No. 175 and, in determining the measure of the increases to be authorized, proceeded on the assumption that said increases would be applied on both interstate and intrastate traffic. They were applied on intrastate traffic in nearly all states (293 I.C.C., 558).

4. After the Interstate Commerce Commission authorized the Ex Parte No. 175 increases on interstate traffic, the railroads applied to the North Carolina Utilities Commission to authorize the same increases on intrastate traffic within that state. By order of July 9, 1953, which by its terms expired on February 28, 1954, the same date that the Interstate Commerce Commission's order expired, the North Carolina Commission authorized the carriers to increase their intrastate rates by the amounts of the Ex Parte No. 175 increases, subject to a few exceptions[1] (293 I.C.C., 543).

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[1] The increases finally authorized by the Interstate Commerce Commission in Ex Parte No. 175 were generally 15 per cent and these were the increases authorized by the North Carolina Commission's order of July 9, 1953, with a few exceptions. The exceptions were fertilizer and fertilizer materials, no increase; sand, gravel, chert, slag, crushed stone or granite, slate cinders and clay or shale cinders, 6 per cent; asphalt, 9 per cent. The Interstate Commerce Commission and the North Carolina Commission had previously authorized lesser interim increases, but it is not thought necessary to detail these increases.

5. The State of North Carolina appealed from its Commission's order to the Superior Court of Wake County. On October 10, 1953, while the appeal was pending, the Interstate Commerce Commission extended the Ex Parte No. 175 increases to December 31, 1955. On January 21, 1954, the carriers petitioned the North Carolina Commission for authority to establish on March 1, 1954, and to maintain until December 31, 1955, the same rates as authorized in its order of July 9, 1953, to coincide with the expiration date of the Interstate Commerce Commission's order (293 I.C.C., 543).

6. Shortly before the hearing of the carriers' petition of January 21, 1953, the Superior Court entered a judgment reversing the North Carolina Commission's order of July 9, 1953. "Substantially, this judgment rested upon the grounds that the railroads had failed to show the revenue received and the operating expenses incurred in the conduct of their intrastate business" and, therefore, had failed to comply with the requirements of a state statute. The North Carolina Commission felt bound by the aforesaid judgment and denied the carriers' petition of January 21, 1954. The effect of the denial was to prohibit the carriers from charging or collecting the Ex Parte No. 175 increases on North Carolina intrastate traffic after February 28, 1954 (293 I.C.C., 543-544).

7. Upon denial of their petition of January 21 by the North Carolina Commission, the railroads sought no further relief with respect to intrastate rates from that Commission or from the state courts, but on March 10, 1954, filed a petition with the Interstate Commerce Commission to institute an investigation under Section 13 of the Act (49 U.S.C. Section 13(3)(4)). The Interstate Commerce Commission, after a full hearing, found that the failure to increase the intrastate rates on North Carolina traffic by the amounts of the Ex Parte No. 175 increases resulted in both unjust discrimination against interstate commerce and, except as to road aggregates, un-

due prejudice and preference as between persons and localities in interstate and intrastate commerce. Based on its findings, the Interstate Commerce Commission issued an order requiring the railroads to make said increases (293 I.C.C., 541, 544). This is the order upheld by the unanimous decision of the three-judge District Court.

We shall now discuss the points which appellants say are involved in this appeal.

THE CIRCUMSTANCES UNDER WHICH THE INTERSTATE COMMERCE COMMISSION MAY PRESCRIBE INTRASTATE RATES ARE WELL SETTLED

Sections 13(3)(4) and 15a(2) were made parts of the Interstate Commerce Act by the Transportation Act, 1920.[3] Since that time, these sections of the Act have been before this Court in numerous cases in which the Court has clearly stated the scope and meaning of the sections and the circumstances under which they authorize the Interstate Commerce Commission to prescribe intrastate rates. Some of these cases are: *Wisconsin R. R. Comm.* v. *C. B. & Q. R. Co.*, 257 U.S. 563; *New York* v. *United States*, 257 U.S. 591; *Georgia Public Service Comm.* v. *United States*, 283 U.S. 765; *Louisiana Public Service Comm.* v. *T. & N. O. R. Co.*, 284 U.S. 125; *Florida* v. *United States*, 282 U.S. 194; *Florida* v. *United States*, 292 U.S. 1; *United States* v. *Louisiana*, 290 U.S. 70; *Illinois Commerce Commission* v. *United States*, 292 U.S. 474; *North Carolina* v. *United States*, 325 U.S. 507; *King* v. *United States*, 344 U.S. 254; *Northern Pacific R. Co.* v. *Montana*, 344 U.S. 905; *Tennessee* v. *United States*, 346 U.S. 891; *Louisiana Public Service Comm.* v. *United States*, 348 U.S. 885; *Illinois Central R. Co.* v. *Mississippi Public Service Comm.*, 349 U.S. 908.

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[3] Section 15a(2) has been changed since its enactment in 1920, but the changes emphasize the duty of the Commission to prescribe rates which will give the carriers adequate revenue. *Florida* v. *United States*, 292 U.S. 1, 6-8.

Many of these cases involved the authority of the Interstate Commerce Commission to require intrastate rates to be increased by the amounts of general increases authorized by the Commission in interstate rates, in so-called general revenue cases, in order to maintain the adequate and efficient national transportation system required by the National Transportation Policy and the rule of rate making stated in Section 15a(2) of the Interstate Commerce Act. The *Wisconsin* and *New York cases, supra,* involved the question of the Commission's authority to require the intrastate passenger fares in those states to be increased to the level of the interstate passenger fares, as authorized in Ex Parte No. 74; *United States* v. *Louisiana, supra,* involved the Commission's authority to require the intrastate freight rates in Louisiana to be increased by the amounts authorized in Ex Parte No. 103; *King* v. *United States, supra,* involved the Commission's authority to require the intrastate freight rates in Florida to be increased by the amounts of the Ex Parte Nos. 162 and 166 increases; *Tennessee* v. *United States, supra,* involved the Commission's authority to require the Tennessee intrastate freight rates to be increased by the amounts of the Ex Parte Nos. 166 and 168 increases; and the recent *Louisiana* and *Mississippi cases, supra,* involved the authority of the Commission to require the intrastate freight rates in those states to be increased by the amounts of the Ex Parte No. 175 increases, the same increases that are involved in the instant case. It is thus apparent that this Court many times has considered and determined the circumstances under which the Interstate Commerce Commission may require intrastate rates to be increased by the amounts by which interstate rates have been increased in general revenues cases.

King v. *United States, supra,* was decided December 22, 1952, and is the latest case of this kind in which the Court felt it necessary to hear argument and render an opinion. There, speaking through Mr. Justice Burton, the Court discussed at considerable length both the findings of the Com-

mission which are necessary to support an order requiring an increase in intrastate rates and the evidence needed to support those findings. The Court also discussed and found to be without merit various contentions of the appellants in that case which are the same as the contentions of the appellants in the instant case (254 U.S., 267-276). The learned District Court regarded the decision in the *King case* as controlling in the instant case. After quoting the Commission's findings in the instant case, the Court said (128 Fed. Supp., 722):

> "The findings were in essence the same as those made by the Commission which were before the Supreme Court and were held sufficient to sustain the Commission's order in King v. United States, 344 U.S. 254, 73 S. Ct. 259, 97 L. Ed. 301. * * * * As similar findings were made here and as they are unquestionably supported by the evidence, there would seem to be little need of further discussion."

THE COMMISSION'S FINDINGS ARE SUPPORTED BY THE EVIDENCE

We have the findings of the Interstate Commerce Commission that the refusal of the state authorities to permit the Ex Parte 175 increases[3] results in unjust discrimination against interstate commerce and persons-localities preference and prejudice. And we have the statement of the District Court that the findings of the Interstate Commerce Commission "are unquestionably supported by the evidence." In addition, appellants do not contend that the Commission's "finding of evidentiary facts is not amply supported by the evidence in the case" (128 Fed. Supp., 721). In these circumstances, it is apparent that no elaborate discussion of the evidence is necessary.

---

[3] The Interstate Commerce Commission required an increase of 12 per cent, instead of 15 per cent, to be applied to the North Carolina interstate rates "on cinders, coal; cinders, clay or shale (Haydite); cinders, slate; coal ashes; and slag, expanded, in open-top cars" (293 I.C.C., 560).

A—The Findings With Respect to Unjust Discrimination Against Interstate Commerce

Finding 1 that "the conditions incident to the intrastate transportation of freight in North Carolina are not more favorable than those incident to the interstate transportation in North Carolina and in adjoining States" is supported by what is said in the Commission's report under the heading *"Intrastate Operating Conditions"* (293 I.C.C., 548).

Finding 2 is that "the amounts and percentages by which interstate freight rates and charges between points in North Carolina and points in other states were increased, as authorized in Ex Parte No. 175, are just and reasonable." This finding is not assailed in the instant case and is supported by the Commission's reports and findings in Ex Parte No. 175, *Increased Freight Rates,* 1951, 284 I.C.C. 589, 289 I.C.C. 395. The Commission was justified in relying upon those findings in the instant case. *Georgia Public Service Comm.* v. *United States,* 283 U.S. 765, 769-770.

Finding 3 includes several findings which may properly be considered separately.

(a) The North Carolina intrastate rates required to be increased are "abnormally low." This finding is supported by what is said in the Commission's report under the heading *"Economic Conditions"* (p. 545), *"Intrastate operating conditions"* (p. 548), *"Rate Relationships"* (pp. 549-552), and also by its evidentiary findings with respect to the rates on various commodities (pp. 552-557).

(b) Intrastate traffic moving under the aforesaid rates "fails to produce its fair share of the earnings required" by Section 15a and the National Transportation Policy. This finding is supported by what is said in the Commission's report under the heading *"Respondents' Property Investment and Revenue"* (pp. 545-548). It is also supported by the statement of the District Court (128 Fed.

Supp., 723) that the Commission "showed that if intra state rates had been adjusted to include the full effect o the Ex Parte No. 175 increases, the total revenues fo 1953 of the principal railroads i.e. the N. & S., the S. A. L the Southern and the Coast Line would have been $509, 787,029 and their North Carolina intrastate revenue $11, 265,176, a ratio of 2.20%. This was contrasted with thei freight revenue for the year 1947, the only post-war yea in which increases were granted simultaneously by th Interstate Commerce Commission and the North Carolin Commission. In that year the ratio was 2.264%. It thu appears that, even with the increases asked, the ratio o intrastate to interstate revenue would be less than i 1947."

(c) "the burden thus cast upon interstate commerce i undue in and to the extent that these intrastate rates an charges are less than they would be on the basis herei prescribed." The basis prescribed, except where a lowe basis was fixed, was that maintained by the carriers un der the authority granted in Ex Parte No. 175 (see Findin 5). This finding is supported by the evidentiary finding already cited, which support Findings 1 and 3(a) and (b)

(d) The North Carolina intrastate rates required to b increased "cause, and for the future will cause, undue, un reasonable, and unjust discrimination against interstat commerce." The evidence supporting this finding is s well stated by the District Court that we quote what i said (128 Fed. Supp., 722):

> "Plaintiffs contend that there was no sufficien showing of discrimination against interstate commerc and in favor of intrastate commerce resulting fro the intrastate rates. It appears, however, that, witl out the Ex Parte No. 175 increases on any of thei traffic in 1953, the return on net investment in 195 for the four principal carriers receiving 87% of th intrastate revenue would have been 0.94% for th Norfolk Southern, 4.63% for the Seaboard, 4.35% fo the Southern and a deficit of more than $4,000,000 fo

the Atlantic Coast Line, or a combined return for the four roads of 2.84%. This is not a case, then, as plaintiffs argue, where an unnecessary increase was granted in a prosperous territory because of a need in other sections. The need for increase existed in North Carolina as these figures show, and the Commission estimated that the total loss from the non-application of the increase in 1953 was $1,500,000. As the cost of handling intrastate freight was shown to be as great as or greater than the handling of interstate freight, the raising of interstate rates without raising intrastate rates necessarily resulted in throwing an undue share of the cost of the service upon interstate transportation."

Finding 5 requires the unjust discrimination against interstate commerce to be removed by increasing the North Carolina intrastate rates by the increases maintained on the interstate rates to, from, and between points in North Carolina under the authority granted in Ex Parte No. 175, except where smaller increases are authorized. As already pointed out, this finding is supported by the evidentiary findings which support Findings 1 and 3(a)(b). Moreover, as this Court stated in *King* v. *United States, supra,* at page 272:

> "The Commission has applied to the Florida operations the same conclusion it reached as to the need for increased revenue on a national basis and has distributed the burden within Florida along the same lines it followed when estimating the revenues available in the southern territory from intrastate as well as interstate operations. In the absence of any showing that it is not applicable to Florida, the evidence which forms the basis of the Commission's nationwide order becomes the natural basis for its Florida order."

Finding 6 is to the effect that the North Carolina intrastate rates, increased as required, will not be unreasonable in themselves or in relation to the interstate rates, and will increase the carriers' revenues by at least $1,300,000 per year.

On page 549 of its report, the Commission points out that "none of the rates on classes or commodities applicable in North Carolina, if subjected to the increases here sought, would be on a higher level than the interstate rates to or from North Carolina points for corresponding distances." The increases required were the same as or less than those sought (Finding 5). This fact, together with the evidentiary findings supporting Findings 1, 2, 3(a), and 3(b), amply support the Commission's finding that the intrastate rates, as increased, will not be unreasonable in themselves or in relation to the interstate rates.

On page 547 of its report, the Commission states that "the total North Carolina intrastate revenue earned in 1953 by all 30 railroads operating in the State amounted to $12,173,123, and the total estimated loss from nonapplication of the increases here sought approximates $1,500.00." This statement is based upon an actual traffic test and upon the testimony of responsible traffic officials of the railroads (293 I.C.C., 557; Exs. 16, 34, and 43). And, although they changed their minds on brief, "the state of North Carolina and the Department of Agriculture of the state admitted in their answer to respondents' petition herein that increasing the intrastate rates as requested would add $1,500,000 each year to the cost of such service * * *" (293 I.C.C., 557).

Finding 7 is that the increased revenues to be derived from the increased rates "are required from intrastate traffic in North Carolina in order to enable the respondents to provide adequate and efficient railway transportation service." This finding is supported by what is said under the heading *"Respondents' Property Investment and Revenue"* (293 I.C.C., 545-548) and by the fact that "even with the increases * * *, the ratio of intrastate to interstate revenue would be less than in 1947," the only post-war year in which increases became effective interstate and intrastate in North Carolina at the same time (128 Fed. Supp., 723).

In view of what has been said, it is plain that the Commission's order requiring the North Carolina intrastate rates to be increased to remove unjust discrimination against interstate commerce is supported by the evidence, as well as by adequate findings.

B—The Findings With Respect to Persons-Localities Preference and Prejudice

It should be pointed out that the Commission's order requiring the North Carolina intrastate freight rates to be increased by the amounts of the Ex Parte No. 175 increases is valid if either the finding of unjust discrimination against interstate commerce or the finding of persons-localities preference and prejudice is supported by the evidence. This is so because Section 13(4) of the Interstate Commerce Act prohibits and declares to be unlawful intrastate rates which result in either unjust discrimination against interstate commerce or in "any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand." *King* v. *United States, supra,* p. 269, note 14. The section also gives the Commission authority to prescribe the intrastate rates necessary to remove either unjust discrimination against interstate commerce or persons-localities preference and prejudice.

Finding 4 in the instant case relates specifically to persons-localities preference and prejudice. In this finding, the Commission concluded that:

(a) "Except as to road aggregates, there is active competition between persons and localities engaged in interstate commerce moving to and from points in North Carolina, on the one hand, and persons and localities engaged in intrastate commerce in North Carolina, on the other hand;"

Since the existence of the above-stated competition is admitted by appellants in their jurisdictional statement (p.

7), it is not necessary to refer to the evidence or the evi dentiary findings in the Commission's report which sustai this finding.

(b) "this competition extends throughout the State o North Carolina and to freight traffic generally."

This finding is supported by what is said at pages 549 557 of the Commission's report. The Commission ther found, among other things (pp. 549-550):

> "Actual movements, both interstate and intrastat of numerous less-than-carload shipments of the sam class-rated commodities to common North Carolin destinations in the period March 15 to April 3, 195 emphasize the existing disparity. A typical example i of a shipment of furniture rated class 125, from Moun Airy, N. C., to Asheville, N. C., 211 miles, on which th intrastate rate was $1.95. A similar shipment of furni ture from Augusta, Ga., to the same destination, 19 miles, was charged a rate of $1.85 plus the 15 percen increase, or $2.13. Whereas the Augusta shippe formerly had an advantage of 10 cents when shippin to Asheville, the nonapplication of the Ex Parte N 175 increase on the intrastate rate has resulted in differential of 18 cents against him. Increasing th intrastate rate as here sought would again place Au gusta, because of its natural geographical advantag in the relative competitive position it formerly held.
>
> "The volume of less-than-carload traffic moving i interstate commerce is materially greater than tha moving intrastate. In this same period, from Marc 15 to April 3, respondents Atlantic Coast Line, Norfol Southern, and Southern Railway transported 3,44 intrastate and 27,625 interstate less-than-carload ship ments to 131 different common destinations in all part of North Carolina to which there were 5 or more ship ments.
>
> "Many commodities also move in carload quantitie from origins in North Carolina and other States t destinations in North Carolina. Thus, in the perio March 15 to April 3 the Atlantic Coast Line, Norfol Southern, and Southern terminated 6,873 intrastat and 7,307 interstate carload shipments of 60 commodi

ties at destinations throughout the State. In the year 1953 the Seaboard Air Line handled 39,296 carloads of intrastate traffic between points in North Carolina, consisting of 96 different commodities. All of these commodities, with the single exception of ice, also moved from or to North Carolina points in interstate commerce, the volume of such interstate traffic aggregating 146,603 carloads."

After referring to certain specific examples of undue preference and prejudice set forth in the Commission's report, the District Court stated (128 Fed. Supp., 723):

"Countless other illustrations of undue discrimination against out of state shipping points as a result of the disparity between interstate and intrastate rates will occur to anyone familiar with the movement of commerce within the state".

(c) "the existing disparities between the current interstate and intrastate freight rates results in undue preference of and advantage to persons and localities in North Carolina in intrastate commerce and undue prejudice of and disadvantage to person and localities in interstate or foreign commerce."

This ultimate finding or conclusion is supported by the following excerpt from the Commission's report (p. 559):

"As stated, the record shows the movement of intrastate and interstate carload and less-than-carload shipments, made during a representative period to common North Carolina destinations, of a wide variety of commodities, including all of those moving in important volume, at both the class and the commodity rates here in issue and their counterpart in interstate commerce. When, as here, there is a substantial disparity between intrastate rates and reasonable interstate rates contemporaneously applied under substantially similar transportation conditions, coupled with a showing of competition between interstate and intrastate rates as indicated by actual shipments which moved to common destinations under the intrastate and interstate rates, there arises the unjust discrimi-

nation against interstate commerce and the undue prejudice to persons or localities in interstate commerce which the act declares to be unlawful. The single exception to the foregoing are the rates on road aggregates, as to which, for the reasons above set out, the record is inadequate to support a finding of undue prejudice and preference as between persons or localities."

In the *Wisconsin Case, supra,* this court held that a finding of persons-localities preference and prejudice, state wide in scope, could not be sustained where the evidence showed discrimination at border points only (257 U.S., 579-580). See also *Florida* v. *United States,* 282 U.S. 194, 205-208. In the instant case, the evidence shows that there is a movement of all sorts of commodities, carload and less-than-carload, from interstate and intrastate origins to points throughout the State of North Carolina. This showing, coupled with the showing of competition between interstate and intrastate shippers, a marked difference between the interstate and the intrastate rates, the total lack of justification for any such difference, and the reasonableness of the interstate rates, amply supports the Commission's finding of state-wide preference and prejudice and the order requiring its removal. The learned District Court so held and its holding is supported by this Court's decisions in *Georgia Public Service Comm.* v. *United States,* 283 U.S. 765, and *Louisiana Public Service Comm.* v. *T. & N. O. R. Co.,* 284 U.S. 125.

THE CONTENTION THAT THE RAILROADS DID NOT ASK THE STATE AUTHORITIES FOR PERMISSION TO INCREASE THEIR RATES ON CERTAIN COMMODITIES, AND THAT CONSEQUENTLY THE INTERSTATE COMMERCE COMMISSION HAD NO AUTHORITY TO REQUIRE INCREASES IN THE RATES ON SAID COMMODITIES, IS WITHOUT MERIT

The contention stated in the heading is based on the fact that in their petition of January 21, 1954, the carriers did not ask for authority to increase the intrastate rates

on the commodities upon which the North Carolina Commission had declined to authorize the full amounts of the Ex Parte No. 175 increases by its order of July 9, 1953 (Jurisdictional statement, pp. 4-5 and 16). But, as we have already pointed out, the order of July 9, 1953, was scheduled to expire on February 28, 1954, and the petition of January 21, 1954, was filed for authority to establish on March 1, 1954, and to maintain until December 31, 1955, the same increases as authorized by the order of July 9, 1953. It was necessary to secure prompt action on the petition of January 21, 1954, otherwise the carriers' authority to charge any of the Ex Parte No. 175 increases would expire, and there was insufficient time to relitigate before the North Carolina Commission the question of their right to the full amounts of the Ex Parte No. 175 increases on the excepted commodities. *They had requested the full amounts of said increases on all commodities in their petition of June 2, 1952, to the North Carolina Commission and that request has never been withdrawn* (293 I.C.C., 543-544).

What has been said plainly shows that the carriers did not ignore the North Carolina Commission and it is significant that that Commission is not a party to this case and is not complaining of anything the railroad appellees did or left undone. Moreover, the carriers' failure to ask the North Carolina Commission a second time to authorize increases it had previously denied cannot possibly affect the authority of the Interstate Commerce Commission to require the rates on said commodities to be increased by the full amounts of the Ex Parte No. 175 increases.

Section 13(3) of the Interstate Commerce Act authorizes the Commission to require any intrastate rates "made or imposed by authority of any State" to be increased to the extent necessary to remove unjust discrimination against interstate commerce or persons-localities preference and prejudice. The intrastate rates on the commodities as to which the North Carolina Commission had refused to authorize the full amounts of the Ex Parte No. 175 increases were unquestionably made or imposed by state authority

and that was all that was necessary to give the Intersta Commerce Commission authority to require those rates be increased. *Florida* v. *United States*, 282 U.S. 194, 21 *State of Illinois* v. *United States*, 101 Fed. Supp. 36, 4 affirmed in 342 U.S. 930, reh. den. 343 U.S. 911; *State United States*, 128 Fed. Supp. 718, 724.

OTHER CONTENTIONS OF APPELLANTS ARE PLAINL WITHOUT MERIT

Appellants make certain other contentions which hav no merit.

1. Appellants' principal contention is that the evidenc of record does not support the Commission's findings b cause it does not show the value of the railroads' pro erties in North Carolina devoted to the transportation intrastate freight and the return they earned on that valu from the transportation of such freight (Jurisdiction statement pp. 7-9).

This same contention was made before the Commissio and in the District Court, and was rejected by both. Th Commission, citing several of this Court's decisions an decisions of its own, concluded that it would have bee "impracticable" for the railroads to attempt to make suc a separation of revenues, values, and operating expense and that such evidence "would serve no useful purpose (293 I.C.C., 557-558). The District Court reached the sam conclusion (128 Fed. Supp., 723-724). The conclusion supported by *Illinois Commerce Commission* v. *Unite States*, 292 U.S. 474, 483-484; *King* v. *United States*, 34 U.S. 254, 273, and the cases therein cited.

2. Appellants also contend that the evidence is insuff cient in that it fails to show that the railroads "are n now rendering adequate and efficient service," or that th increases the Commission required will result in improve service (Jurisdictional statement p. 7). But surely th Commission is not required to wait until rail service

inadequate and inefficient before it can authorize such increases in rates as it finds to be necessary to produce the revenue the carriers need or before it can require intrastate traffic to contribute its "fair proportionate share" of the needed revenue. See *Increased Freight Rates,* 1951, 289 I.C.C. 395, 440. Moreover, the Commission's reports in Ex Parte No. 175, and the other proceedings in which general rates increases have been authorized, show that said increases have enabled the railroads greatly to improve their service. See *Increased Freight Rates,* 1951, 281 I.C.C. 557, 590. See, also, Finding 1.

3. Appellants contend that the railroads operating in North Carolina do not need additional revenue, and rely upon recent improvements in their financial condition to support that view (Jurisdictional statement, pp. 10-11). But it cannot be denied that the need of the railroads for additional revenue is primarily a matter for the Interstate Commerce Commission to determine. If this were not true, the Commission would be wholly unable to perform the duties imposed upon it by the National Transportation Policy and Section 15a(2) of the Interstate Commerce Act. When the evidence shows that the combined rate of return of the four principal North Carolina railroads was only 5.10 per cent in 1953 and without the Ex Parte No. 175 increases would have been only 2.84 per cent, the Commission's finding that they need the additional revenue which will be produced by applying the Ex Parte No. 175 increases to their intrastate rates is not open to review (293 I.C.C., 546; 128 Fed. Supp., 722).

4. Appellants say that since the difference between the interstate and the North Carolina intrastate rates does not prevent interstate shippers from shipping into North Carolina, there is no basis for the Commission's finding of persons-localities preference and prejudice. This same contention has been made in other cases under Section 13 of the Act and found to be without merit. Thus, in *Increases*

in Tennessee Freight Rates and Charges, 272 I.C.C. 625, the Commission pointed out, at page 643:

> "The belief that no discrimination or injury can occur when goods are sold in Tennessee notwithstanding the freight charges, or when the products of manufacturers, producers, or distributors that were formerly disposed of in Tennessee are absorbed by other markets, is erroneous. It is the right of a shipper to choose his market. Unnatural and unwarranted barriers to such a choice are prejudicial."

See also *Northeast Kentucky Coal Bureau* v. *C. & O. Ry. Co.,* 206 I.C.C. 445, 448, order sustained in *Chesapeake and Ohio Railway Co.* v. *United States,* 296 U.S. 187.

5. Finally, appellants contend that the instant case should be briefed and argued before this Court because of an alleged conflict between the decision of the District Court in the instant case and the decision in *Mississippi Public Service Commission* v. *United States,* 124 Fed. Supp. 809, (Jurisdictional statement, p. 16). Actually, there is no conflict.

In the *Mississippi case,* the three-judge District Court found that the Commission's order was not supported by the evidence and issued an injunction setting it aside. In the *Louisiana case,* (*Louisiana Public Service Commission* v. *United States*) 125 Fed. Supp. 180, the three-judge District Court found that the Commission's order was supported by adequate findings and by the evidence and refused to set it aside. In one case the Commission's order required the intrastate rates in Mississippi to be increased by the Ex Parte No. 175 increases and in the other required the intrastate rates in Louisiana to be increased by said increases. The Court granted a motion to affirm in each case (349 U.S. 908; 348 U.S. 885). The fact that a motion to affirm was granted in each case shows that since numerous decisions have established the extent of the Commission's authority under Section 13 of the Act, this Court will not ordinarily undertake to review voluminous

evidence to determine whether or not it supports the Commission's findings.[4]

It is manifest that the instant case is one in which it is unnecessary for this Court to undertake the laborious task of reviewing the evidence for the purpose of determining whether or not it supports the Commission's findings. Every administrative and judicial tribunal which has considered the evidence, not excluding the North Carolina Commission, has concluded that it justifies an increase in the North Carolina intrastate rates by the amounts of the Ex Parte No. 175 increases.

CONCLUSION

In *Ohio* v. *United States*, 292 U.S. 498, 506, which was a proceeding under Section 13(3)(4) of the act, the Court said:

> "In effect, we are asked to re-examine the evidence, appraise it, and hold the Commission erred in its judgment as to the facts. We have often said that we have no such power."

The appellants are here asking the Court to assume responsibility for primary review of administrative orders normally falling within the function assigned to the three-judge court (*Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474) and also to substitute its judgment for that of the Commission on matters of fact which have been entrusted to the special competence and expertise of the Commission. Since the Court has held that it has no such power and the other contentions made by appellants are without merit, it follows that a motion to affirm should be granted.

Wherefore, the premises considered, the railroad apel-

[4] The evidence in the instant case consists of 772 pages of testimony and 54 exhibits.

lees pray that the judgment of the three-judge District Court be affirmed.

Respectfully submitted,

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Certificate of Service

I, Henry J. Karison, one of the attorneys for the railroad appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the twenty-seventh day of May, 1955, I served copies of the foregoing Motion to Affirm on the several parties thereto as follows:

1. On the State of North Carolina and intervening plaintiffs by mailing copies, in duly addressed envelopes, with

first-class postage prepaid, to their respective attorneys as follows:

HARRY MCMULLAN, Attorney General,
I. BEVERLY LAKE, Assistant Attorney General,
Attorneys for the State of North Carolina and the North Carolina Department of Agriculture
Address: Justice Building,
Raleigh, N. C.

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Attorney for the North Carolina State Highway and Public Works Commission
Address: Highway Building,
Raleigh, N. C.

BROUGHTON AND BROUGHTON
Attorneys for the North Carolina Farm Bureau Federation, Inc., and the Farmers Cooperative Exchange
Address: Commercial Building,
Raleigh, N. C.

2. On the United States of America, by mailing a copy in duly addressed envelopes, first-class postage prepaid, to the Solicitor General, Department of Justice, Washington 25, D. C., to Stanley N. Barnes, Esq., Assistant Attorney General, and Riggs McConnell, Esq., Department of Justice, Washington 25, D. C., and by mailing a copy to Julian T. Gaskill, Esq., United States Attorney for the Eastern District of North Carolina, Room 303, Federal Building, Raleigh, North Carolina.

3. On the Interstate Commerce Commission, by mailing a copy in a duly addressed envelope, first-class postage prepaid, to Edward M. Reidy, Esq., its Chief Counsel, and to Leo H. Pou, Esq., its Assistant General Counsel, at the offices of the Commission, Washington 25, D. C.

(Signed) HENRY J. KARISON,
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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 757

STATE OF NORTH CAROLINA, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1 (c), of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment entered February 11, 1955, by a three-judge district court convened pursuant to 28 U.S.C. 2284, 2325, dismissing an action to set aside an order of the Interstate Commerce Commission. The order

increased certain intrastate rail rates on freight moving in North Carolina.

Following a nation-wide increase in interstate freight rates ordered by the Commission, rail carriers operating in North Carolina requested the North Carolina Utilities Commission to grant comparable increases in intrastate freight rates. The state commission refused to do so,[1] and the carriers then petitioned the Interstate Commerce Commission to increase the intrastate rates to the level of the interstate rates. After full administrative proceedings, the Commission granted the requested increases with certain minor exceptions. *North Carolina Intrastate Freight Rates and Charges,* 293 I.C.C. 541.

On review, a three-judge district court unanimously sustained the order. The court (*per* Circuit Judge Parker) held that the Commission's findings are adequate to support the order, and that the findings in turn are "unquestionably supported by the evidence."

ARGUMENT

Section 13 (4) of the Interstate Commerce Act authorizes the Commission to prescribe new intrastate rates if it finds that existing intrastate rates cause (1) unjust discrimination against interstate commerce, or (2) undue preference or prejudice against persons or localities in interstate commerce. In *King* v. *United States,* 344 U.S. 254, this Court

[1] The state commission initially had granted certain of the increases for a limited time, but it refused to extend them after its first order had been set aside by a state court.

held (pp. 270-271) that a Commission order designed to remove unjust discrimination against interstate commerce, which increased Florida intrastate rates to the interstate rate level, was supported by findings (1) that the intrastate rates were abnormally low and were not contributing their fair share to the carriers' revenues; (2) that the transportation conditions incident to the intrastate movement were not more favorable than those incident to the interstate movement; (3) that the increased intrastate rates would not exceed a just and reasonable level; and (4) that such increased rates would substantially increase the carriers' revenues therefrom, and would constitute not more than a fair proportion of their total income. As the court below correctly held, the Commission's findings in the instant case were "in essence" the same as those in *King* and they fully support the order. [2]

The lower court also correctly held that the Commission's findings were adequate to support the conclusion that the intrastate rates caused undue preference and prejudice between persons or localities. In addition to the findings previously

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[2] In the instant case, the Commission found (293 I.C.C. at 559-560), *inter alia*, that the intrastate rates were abnormally low and not producing their fair share of the carriers' necessary earnings (Fdg. 3), that the conditions incident to North Carolina intrastate transportation are not more favorable than those incident to the interstate transportation (Fdg. 1), and that the increased intrastate rates will not be unreasonably high and will increase the carriers' annual revenues by at least $1,300,000 (Fdg. 6).

noted (see *supra,* note 2), the Commission found that, with certain exceptions, there is active competition between persons and localities engaged in intrastate commerce and those in interstate commerce, and that the competition extends throughout the state and to freight traffic generally (Fdg. 4, 293 I.C.C. at 560). These findings are adequate to sustain a statewide order for the removal of the preference and prejudice. *Georgia Public Service Commission* v. *United States,* 283 U.S. 765; *Louisiana Public Service Commission* v. *Texas and N. O. R. Co.,* 284 U.S. 125.

Appellants do not challenge the sufficiency of the findings to sustain the order. Their principal contention (Jurisdictional Statement 7-14) is that the findings lack adequate evidentiary support. This issue was fully briefed and argued before the lower court which, after careful consideration, concluded that the findings were "unquestionably supported by the evidence." We submit that the correctness of this conclusion presents no question of general importance justifying further review by this Court.

The underlying evidence is summarized in the Commission's report, and we shall not repeat it here. We invite attention, however, to the fact that the lengthy record before the Commission contained extensive data on such matters as economic conditions in the state (293 I.C.C. at 545-548); intrastate operating conditions (p. 548); the relationship between the interstate and intrastate rates (pp. 549-550); movements of the principal

commodities handled by railroads in North Carolina, and transportation factors affecting such movements (pp. 550-557).[3]

This Court has indicated that the initial reviewing court has "primary responsibility"[4] for determining "[w]hether on the record as a whole there is substantial evidence to support agency findings," and that it will re-examine the record only in the "rare instance" where the reviewing court has "misapprehended or grossly misapplied" the governing criteria. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 491. There is no claim here that the lower court mis-

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[3] Although appellants complain (Jurisdictional Statement 7-9) that there is no evidence as to segregated interstate and intrastate operating expenses, revenues and property, it is settled that "[w]here the conditions under which interstate and intrastate traffic move are found to be substantially the same with respect to all factors bearing on the reasonableness of the rate, and the two classes are shown to be intimately bound together, there is no reason to deal with the reasonableness of the intrastate rates more specifically, or to separate intrastate and interstate costs and revenues." *Illinois Commerce Commission* v. *United States,* 292 U.S. 474, 483-484, and cases there cited; *King* v. *United States,* 344 U.S. at 273. Since the Commission found (293 I.C.C. at 548) that the interstate and intrastate traffic were handled under similar conditions, segregated figures were not required.

Appellants' contention (Jurisdictional Statement 11-13) that there is no evidence that the higher interstate rates prevented out-of-state shippers from selling in the North Carolina market similarly is beside the point. The Commission can raise intrastate rates which cause undue preference and prejudice to persons or localities in interstate commerce and there may be such preference or prejudice even though it does not actually exclude interstate shippers from the intrastate market.

[4] *National Labor Relations Board* v. *Pittsburgh S. S. Co.,* 340 U.S. 498, 502.

conceived its reviewing function and there appear to be no special circumstances which would warrant a second recanvassing of the record. See *New England Divisions Case,* 261 U.S. 184, 203-204; *Radio Corp.* v. *United States,* 341 U.S. 412, 415; cf. *United States* v. *Yellow Cab Co.,* 338 U.S. 338, 342. The fact that there may be evidence in the record from which another trier of the facts might have reached a conclusion contrary to that of the Commission affords no basis for overturning the Commission's order. See *United States* v. *Detroit Navigation Co.,* 326 U.S. 236, 241; *United States* v. *Pierce Auto Freight Lines,* 327 U.S. 515, 536.[5]

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[5] Appellants also contend (Jurisdictional Statement 14-15) that the Commission cannot grant increases which the carriers had not previously sought from the state commission. But Section 13 (4) of the Act gives the Commission plenary power to raise intrastate rates "whenever" it finds that such rates discriminate or cause preference and prejudice against interstate commerce, and once it makes that finding it can grant the increase without regard to whether a comparable increase had been sought from the state commission. Cf. *Florida* v. *United States,* 282 U.S. 194, 210.

CONCLUSION

For the foregoing reasons, we submit that the decision below is correct and that this appeal presents no substantial question. The judgment of the district court should accordingly be affirmed.

Respectfully submitted,

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No. 55. NORTH CAROLINA ET AL. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Eastern District of North Carolina. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *Harry McMullan,* Attorney General, and *I. Beverly Lake,* Assistant Attorney General, for the State of North Carolina, and *R. Brookes Peters* for the North Carolina State Highway and Public Works Commission, appellants. *Solicitor General Sobeloff, Assistant Attorney General Barnes, Daniel M. Friedman* and *Edward M. Reidy* for the United States and the Interstate Commerce Commission, and *James B. McDonough, Jr., Charles P. Reynolds, Arthur J. Winder, William T. Joyner, Arthur J. Dixon* and *Henry J. Karison* for the Aberdeen & Rockfish Railroad Co. et al., appellees. Reported below: 128 F. Supp. 718.